IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 841 of 2001
(Old No. 1668 of 1987)

Ataru Vs. State

Date of decision: - 07/4/2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 07/4/06 Initials of Judge

Note: - Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL, AT NAINTIAL

CRIMINAL APPELA NO.841 OF 2001
(Old No. 1668 of 1987)

Ataru S/o Ganga
R/o Village Kaprara, Patti-Dhasgi
Police Station-Bansgaon
District- Uttarkashi ….Appellant

Versus

State of Uttaranchal …Respondent

Sri Dinesh Singh Chauhan, learned counsel for the appellant
Sri Sohali Ahmed Siddiqiue, learned A.G.A. for the State

Hon'ble J.C.S. Rawat, J.

This is a criminal appeal against the judgment and order dated 9th June, 1987 passed by the Sessions Judge, Uttarkashi in S.T. No. 14 of 1986 whereby the appellant was convicted under section 376 and 366 I.P.C. The learned Sessions Judge sentenced two years u/s 376 I.P.C. and also two years R.I. u/s 366 I.P.C.

Brief facts of the prosecution case are that the complainant Musya alongwith his wife and daughter-victim on 17.07.1984 went to work in the field. The complainant and his wife returned in the evening and left their daughter-victim to work in the field. When their daughter did not return to home, the complainant went in search of his daughter. On the next day the complainant came to know that his daughter was kidnapped by Ataru with intention to marry her. The accused Ataru kept Sita in the house of Gwanu and Ratana and there he committed rape upon her. Thereafter, on 24.07.1984 the complainant lodged the report (Ex.ka.1) and patwari Chowki, Bangaon, Tehsil Dunda, Distt. Uttarkashi. The Patwari Budhi Singh on the basis of the written report prepared chick F.I.R. (Ex.Ka.4) and G.D. entry (Ex.ka.5) was made to register a Case Crime No.3 of 1984 u/s 363, 366 and 376 I.P.C. against the accused. The Patwari Budhi Singh took the investigation in his hand. He recorded the statement of the witnesses and prepared the site plan at the place of occurrence. The

investigation was taken up as usual which culminated into the submission of the chargesheet against the appellant & two others Gwanu and Ratana.

After submission of chargesheet the accused was committed to the Court of Sessions for trial and the trial court on 13.01.1987 framed charges against the accused/appellant-Ataru, Gwanu and Ratana and the accused denied the charges leveled against them and claimed the trial.

The prosecution in order to support its case, produced Musya(P.W.1), who is the complainant. Victim (P.W.2) is prosecutrix, who has narrated the entire prosecution case. Chatar Singh (P.W.3) said to have seen Ataru and Sita going together but he turned hostile during trial. Dr. Mrs. Premwati Dimri (P.W.4) had medically examined the victim and proved the medical examination report (Ex.2). Ram Nath (P.W.5) has proved the X-ray report (Ex.Ka.3). Patwari Budhi Singh is the Investigating Officer who has proved the chick F.I.R., G.D. Entry, Site plan, recovery memo etc.

In the statement recorded u/s 313 Cr.P.C. the accused denied the prosecution case and stated that he has been falsely implicated in this case.

The learned trial court after appraisal of the evidence on record, convicted the appellant under section 376 and 366 I.P.C. The learned Sessions Judge sentenced two years u/s 376 I.P.C. and also R.I. for a period of two years u/s 366 I.P.C. The trial court had also convicted Gwanu and Ratana u/s 368 for a period of already undergone and only fine of Rs. 2000/-respectively. Accused Gwanu and Ratana had not preferred the appeal.

Heard learned counsel for the parties and perused the record.

It is pertinent to mention here that it is a well settled position of law that if the evidence of the victim is found reliable it does not require any corroboration on the material points. It is well settled that a prosecutrix complaining of having been a victim of the offence

of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. If the court comes to the conclusion that the evidence of the victim is cogent and credible, it does not need any further corroboration by any other independent evidence.

In view of the above, I have to analyze as to whether the evidence of the prosecutrix is reliable or not. The prosecutrix was examined as PW-2 before the court below and during her cross examination she has stated that she was taken to the house of Smt. Ratana and she was subjected to rape there during the night. She has also stated that she had not stated this fact to Ratana that she was being raped by the appellant. The prosecutrix tried to resist the appellant at the time of the rape and in that struggle her cloths were torn. If it would have been so Ratana could have seen those torn clothes but this fact is not been revealed from the evidence. It is also in the cross examination of the prosecutrix that she had a son at the time of giving the evidence before the court below and she had stated that the father of that son is the present appellant Ataru. The prosecutrix had also stated in her cross examination that she was taken on the threat of the knife from the field where she was working. It is also in the cross examination that she was taken to the house of Ratana by bus and she had not made any hue and cry in the bus. It is also admitted that she had also boarded at Uttarkashi station and it is natural that the station would be crowed and she could have seek the help of the police personnel person posted at the bus station and other persons present at the station. It is also stated in the cross examination that the appellant-Ataru has stated to Ratana that the prosecutrix is his wife. The learned Sessions Judge while appreciating the evidence of the prosecutrix-PW2 has observed that they passed the first night in the Village Kapada and second day they went to the house of the Gwanu where they live for 4-5 days.

she has further stated that Gwanu took her alongwith Ataru to Uttarkashi courts where they moved an application before the Marriage Officer for performing their court marriage. Thereafter, they went to the village khand and lived in the house of Ratana for 20 days. It was also observed by the learned Sessions Judge that they came to Uttarkashi again to attend the hearing of the proceedings fixed by the Marriage officer. It was also observed by the Sessions Judge that the accused Gwanu who was also accompanying them told that Patwari was present in the court, so they went back to the house of Ratana without appearing before e the Marriage Officer. It is also pointed out that the medical report reveals that there was no external injury on the person of the victim. This fact shows that no resistance was placed at the time of the sexual intercourse as she has sustained no injury on the part of her body. Thus the evidence of victim-PW2 that she made the resistance at the time of rape is not believable. The learned Sessions Judge also held that the circumstances as pointed above in leads to take the inference that the prosecutrix was the consenting party and the learned Sessions Judge was correct in observing that the prosecutrix was the consenting party to the sexual intercourse.

The learned Sessions Judge had held that the prosecutrix was minor at the time of commission of the offence therefore the appellant was convicted and the learned Session Judge further held that the consent of the prosecutrix is immaterial if the girl is minor.

Now I have to examine as to whether the evidence adduced by the prosecution is sufficient to prove the factum of minority of the prosecutrix. The mother of the prosecutrix who has stated that the prosecutrix was 15 years of age at the time of commission of the offence and she was not able to give exact date of birth. The prosecutrix has also stated that she was 15 years of age at the time of commission of the offence. The medical report reveals that the age of the prosecutrix at the time of the commission of the offence

was about 16 to 18 years. The accuse-appellant has given the suggestion to the witnesses that the age of the prosecutrix was 19 years at the time of the incident. The said suggestion has been denied by the prosecution witnesses. Now at the first instance, I have to see as to whether there is any documentary evidence on record which can prove the age of the girl. The defence has filed the declaration at the time of the marriage at Uttarkashi Court where the age of the girl had been shown as 19 years and it bears the signature of the victim. The prosecution had not suggested that the said certificate was given by the prosecutrix under threat or under any pressure as such in absence of such evidence the documentary evidence which has been produced by the accused- appellant cannot be disbelieved. Apart this the Investigating Officer ahs admitted that the Kutumbh register could not be produced before the court below. Non-production of the kutumbh register also leads to take inference that it was against the prosecution. It is also on record that no exact date of birth was given by the mother of the prosecutrix. It transpires from the record the kutumbh register extract was in the case dairy, the copy of which was given to the accused and that was not proved by the prosecution during the statement recorded before the court below. It is also revealed that the defence had moved application with the prayer that the Gram Pradhan be summoned with the following documents:-

1. Original Kutumbh register-part2
2. Birth and Death register maintained in form D
3. Receipt reported birth required to be maintained in Form 26-A.

The application was opposed by the prosecution and that was rejected on 24.04.1987 which is on record. This fact further shown that the entries of the kutumbh register was not in favour of the prosecution as such that prosecution tried to conceal this fact before the court below. The medical report further fortifies the documentary

evidence produced by the defence. In view of the above, I find that the victim was more than 16 years of age at the time of incident. I find that the learned Sessions Judge had erred in holding that the girl was minor. If the victim was more than 16 years of age & she was a consenting party, the offence of rape is not made out u/s 376.

The co-accused Ratana and Gwanu had been convicted by the trial court and it was pointed out that they had not preferred appeal before this court.

Now the question arises as to whether the benefit of the present findings should be extended to the co-accused Ratana and Gwanu or not. It has been held in **Bijoy Singh and another Vs. State of Bihar 2003 SCC (Cri) p/1093:-**

"12. Awadhesh Singh (A-11) who has also convicted with the aid of Section 149 I.P.C. has not filed an appeal in this Court. In view of the judgments of this court in **Raja Ram Vs. State of M.P. {See 1994(2) SCC p/568, 1994 SCC (Cri) p/573}, Dandu Lakshmi Reddy Vs. State of A.P. {See 1999 (7) SCC /69, 1999 SCC (Cri) p/1176} and Anil Rai Vs. State of Bihar {See 2001 (7) SCC p/318, 2001 SCC (Cri) p/1009, J.T. 2001 (6) SC p/515}** *he is also entitled to the benefit of this judgment. This Court has set up a judicial precedent that where on evaluation of the case if the court reaches the conclusion that no conviction of any accused is possible, the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an appeal."*

The co-accused-Ratana & Gwanu had been sentenced under Section 368 I.P.C. for concealing and keeping the prosecutrix in confinement. The sexual intercourse committed with the victim is not an illicit intercourse and as such it is not an offence u/s 376 I.P.C. As I have discussed above, the girl was major at the time of the incident as such, no offence is made out against Ratana & Gwanu and the benefi of the findings must be extended to the co-accused, similarly

Situated, though they had not challenged the order by way of an appeal.

In view of the above discussion I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has erred in convicting and sentencing the appellant as well as other co-accused. Hence, the appeal is allowed and the conviction and sentence against the appellant & other co-accused Ratana and Gwanu awarded by the Trial court are set aside.

Let the lower court record be sent back to the court concerned.

(J.C.S. Rawat, J.)

Dated 07.04.2006

Shiv